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Nos. 00-1751, 00-1777, 00-1779

IN THE

Supreme Court of the United States

October Term, 2001

SUSAN TAVE ZELMAN, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*, and SUE GATTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS SUE GATTON, MICHAEL DEBOSE, CHERYL DEBOSE, GLEN ALTSCHULER, AND DEIDRA PEARSON

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Ohio Voucher Program under which tax monies are paid without restriction as to use to private elementary schools in Cleveland, of which a preponderant majority are sectarian and in which the district court found "that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience", violates the Establishment Clause of the First Amendment to the United States Constitution.

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COUNTER-STATEMENT OF THE CASE

I. *The Essentially Undisputed Facts*

The two sets of respondents, Doris Simmons-Harris, *et al.*, and Sue Gatton, *et al.*, brought separate actions, which have been consolidated throughout, to have enjoined as violative of the Establishment Clause the central portion of the Ohio Scholarship Program, which has been referred to generally as the Cleveland Voucher Program, embodied in Ohio Rev. Code Anno. (Anderson) (hereinafter "R.C.") §§ 3313.974-3313.979. Both courts below have sustained the claim, with Judge Ryan dissenting in the circuit, and the case is here on this Court's writ of certiorari.

The Voucher Program was enacted in 1995 following a takeover of the Cleveland City School District by the State pursuant to a U.S. district court order. The legislation also created a tutorial program for grants much smaller than the voucher amounts to students attending Cleveland public schools. The constitutionality of the latter program is not questioned by anyone, but it plays a part in respondents' arguments for sustaining the Voucher Program. After being held invalid in June 1999 on state constitutional grounds, the Voucher Program was re-enacted by the Ohio Legislature later in that month, and it is the Program as re-enacted that is now before this Court.

From the district court's full account of the undisputed facts, the following are noted as salient for this counter-statement:

- Both Cleveland private schools and public school districts adjacent to the Cleveland District are eligible to participate in the Voucher Program by registering for it with the State Superintendent. However, in the more than six years of the Program's operation, no adjacent district has registered to participate (State Pet. App. 63a).

• The Program provides for vouchers, awarded by lot, worth up to $2,500. Students whose family income does not exceed 200% of the federally-defined poverty level receive up to 90% of their school tuition. Students in families with higher incomes receive up to 75%. R.C. § 3313.978(C).

• Public schools in districts adjacent to Cleveland receive on average $7,097 in public funding per student as against the $2,250 payable for voucher students (JA 56a).[1]

• Checks for the voucher amounts are drawn to the parents and sent to the participating private schools where the parents must appear and endorse the check to the school. There are no restrictions on the uses to which the private schools may put the funds thus received (JA 63a).

• As found by the district court and reflected in the schools' handbooks or mission statements (which can be found in the Joint Appendix at pp. 293a-521a), with respect to the sectarian private schools, "it can generally be said that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." (State Pet. App.64a.)

• At the beginning of the 1999-2000 school year 56 private schools were registered to participate in the Voucher Program. Forty-six of these, over 82%, were religiously-affiliated. There were 3,761 students enrolled in the program; of these, 3,632, over 96%, were in sectarian schools. (State Pet. App. 64a.)

II. *The State Litigation*

Both groups of respondents sued initially in Ohio state court where, as here, the cases were consolidated.

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[1] This and similar references are to the Joint Appendix in this Court.

The complaints asserted (1) a variety of state constitutional objections to the Program and (2) if the state contentions failed, that the Ohio law should be held invalid as a violation of the Establishment Clause. A dismissal by the trial court was reversed by the Ohio Court of Appeals on both state constitutional grounds and the Federal Establishment Clause claim. Thereafter, the Supreme Court of Ohio also found the law void under the State's Constitution, but only on the ground that the Voucher Program, created as part of a general appropriations enactment, violated the "one-subject" rule of Article II, Section 15(D).

Having voted that the Program was not validly enacted and therefore must be set aside under the State's Constitution, the Ohio Supreme Court majority also opined that the claim under the Establishment Clause (with an exception that soon became and remains immaterial) was not meritorious. It declared that the holding in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), upon which the state as well as the later federal complaints relied, "has been undermined by subsequent case law." *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 5, 711 N.E.2d 203, 208 (1999). Having written in the State's favor on that and other grounds, the Ohio court held, as noted above, that "the School Voucher Program must be" struck down because its enactment had violated the one-subject rule. *Id.* at 17, 711 N.E. 2d at 216.

The Ohio Supreme Court added, however: "our holding is stayed through the end of the current fiscal year" in order to allow completion of the then current school year. *Id.* The Ohio Legislature then re-enacted the Program on June 29, 1999, avoiding the state constitutional flaw of its earlier action.

III. *The Instant Proceedings*

Following re-enactment of the Program, the plaintiffs (respondents) sued again, this time in the

Northern District of Ohio, to have it enjoined as a violation of the Establishment Clause. Two groups appearing now as petitioners were granted the right to intervene as defendants. Following discovery of facts that give rise to no genuine dispute and fairly extensive briefing, the district court granted summary judgment for plaintiffs but stayed its order on consent pending review by the Sixth Circuit.

The district court wrote a detailed summary of the facts and an extensive account of its legal conclusions. Unlike the Ohio Supreme Court, it held that *Nyquist* has not been overruled or "undermined" in any sense that allows lower courts to conclude that it "should not be followed" (State Pet. App. 93a). In support of this conclusion, the district judge reviewed the series of this Court's decisions since *Nyquist* that continue to be debated in this connection and found significant, *inter alia*, that (1) "students in the Voucher Program have no meaningful choice between attending sectarian or nonsectarian schools" (State Pet. App. 106a), (2) "nearly all state aid under the Voucher Program will flow to religious institutions" (*id.*), (3) this program is in fact "skewed toward religion" (*id.*), (4) other cases invoked by petitioners differ critically from this one because in this case "all monies under the Program flow directly to the coffers of religious schools" (*id.* at 109a), and (5) other forms of publicly supported education (e.g., community schools and magnet schools) are not material to the question of "choice" as it relates to the challenged Program (*id.* at 118a-119a).

The Court of Appeals for the Sixth Circuit affirmed (2-1). Reviewing *de novo* the district court's grant of summary judgment, the circuit agreed with the district court in appraising the facts and the impact of *Nyquist* and subsequent cases, concluding "that *Nyquist* governs our result" (State Pet. App. 24a). It found "illusory" the purported choice between private schools and public schools from districts adjacent to Cleveland since none of the latter are in the Program and available to parents as

choices (*id.* at 26a). Like the district court, the court of appeals found the controlling effect of *Nyquist* for this case unimpaired by decisions of this Court since 1973.

The dissenting circuit judge declared that "*Nyquist* is simply inapposite" to the appeal in this case (State Pet. App. 35a). He would have held the Ohio statute to be entirely "unlike the New York statute [in *Nyquist*] both in its purpose and in the manner of its application" (*id.* at 37a). Further, he said, "the rule of law upon which *Nyquist* was decided has changed" (*id.* at 39a). He would have found that there is "a genuine choice" for children under the Cleveland Voucher Program in that it makes available tutorial assistance in the public schools and potential seats in adjacent school districts (*id.* at 45a-46a). He criticized the majority for what he saw as taking the ground that "the religious schools in the program are too religious" (*id.* at 48a). And he added, among other things, his hope (not fulfilled) that his "colleagues [would] take this case for *en banc* review" (*id.* at 58a).

SUMMARY OF ARGUMENT

I. The substantial and wholly unrestricted grants of State funds to Cleveland religious schools, which have a primary purpose of teaching and promoting religious doctrine, violate a fundamental prohibition of the Establishment Clause. The formality of checks made out to parents, who have no choice but to endorse them over to the religious schools, leaves clear that these are direct grants to the schools.

The Establishment Clause principles forbidding such grants have been clear since James Madison and his colleagues formulated them in the First Amendment, and have been steadily enforced by this Court. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which is squarely within these principles, leads *a fortiori* to affirmance in this case. The Cleveland religious schools supported by the Voucher Program proclaim as vital centers

of their efforts the promotion of religious doctrine that "permeates" all of their teachings (*e.g.*, JA 337a). Government funds are employed not only to indoctrinate children of families belonging to the schools' respective religions but also to proselytize among the majority of the voucher students whose families are of religions other than the sponsors of the schools they attend (Hanna Perkins Br. 7-8, 47). Typically, the St. Patrick School describes its mission as being "to live and teach the Gospel message" (JA 408), and a Lutheran School in the Program says "the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer and Sanctifier", with its "primary focus . . . on our Lord and Savior, Jesus Christ" (JA 437a-438a).

The Court's decisions since 1973 have not altered or "undermined" the sound Establishment Clause doctrine followed in *Nyquist*. Petitioners have made no showing whatever of changed social facts or doctrinal error in *Nyquist* sufficient to approach the kind of "special justification" sufficient to justify overruling that precedent. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 854-855 (1992).

II. The Cleveland Voucher Program, heavily skewed toward religion, was correctly seen by the courts below as presenting "no meaningful choice between attending sectarian or nonsectarian schools." (State Pet. App. 106a and 157a-158a.) The petitioners' invocation of *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), where a rare grant to attend a school for religious studies was made to a handicapped adult student with choices among a large universe of almost totally secular institutions, is of no help to them in attempting to avoid the Establishment Clause barrier against direct grants to religious elementary schools of the kind involved in this case. The Ohio statutory provision for "tutorial assistance" grants of up to $360 for children in the public schools,

supposedly to "balance" the grants of up to $2,250 for religious school students, is at best an irrelevancy, at worst a transparent form of legislative window-dressing.

III. Serving in fact to fund preponderantly religious private schools, with some 96% of the voucher places going to students in such schools, the Voucher Program is not "neutral" in any conceivably material sense. Government must indeed remain truly neutral in matters of religion. The Ohio Program neither meets the requirement nor is defensible under the Establishment Clause; "facial neutrality" is not constitutionally sufficient when "in fact the State is lending direct support to religious activity." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976)(plurality opinion).

ARGUMENT

I. THE SUBSTANTIAL GRANTS GOING DIRECTLY TO SECTARIAN ELEMENTARY SCHOOLS UNDER THE CLEVELAND VOUCHER PROGRAM, AND AVAILABLE WITHOUT RESTRICTION FOR RELIGIOUS FUNCTIONS AND ACTIVITIES, ARE CORE VIOLATIONS OF THE ESTABLISHMENT CLAUSE

At the heart of the Religion Clauses, buttressing rather than qualifying in this central respect the right of Free Exercise, the core protection of the Establishment Clause defends all of us against compelled support through tax monies of functions or activities of religions of which we are nonadherents or opponents or even supporters as voluntary members. From the germinal conceptions of James Madison through the history of this Court's attentions in the twentieth and twenty-first centuries, the fundamental understanding has been that "general assessments in support of religion . . . lie at the core of the prohibition against religious funding." O'Connor, J., concurring in *Rosenberger v. Rector*, 515 U.S. 819, 851 (1995). In that vital core is the fact that this Court has

never allowed unrestricted public funding of religious elementary or high schools. Because this crucial limit imposed by the Establishment Clause deprives religious organizations of public funds available to their secular counterparts, recurrent efforts have come to this Court, and been rebuffed, to transcend or revise the barrier. The Cleveland Voucher Plan is another such effort. The salutary course of precedent, the grounds of which remain clear and firm, should lead in this case, we submit, to defeat of the attempt.

A. *Despite the Transparent Form of Payment to Parents, the State's Checks in Undisputed Fact are Paid Over Directly and Exclusively to the Schools*

The procedure for the State's disbursement and the subsequent freedom to employ the voucher monies is succinctly described by the district court as follows (State Pet. App. 63a):

> Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipients; thereafter, the parents must endorse the check to the school. The State places no restriction on how the private school may utilize the money.

Whether or not this procedure is in itself decisive, it is a material fact among others that define the problem and point toward the answer. The tuition payments held invalid in *Nyquist* were for *reimbursement* of tuition already paid; proceeds of the checks they received could be used by the parents as they saw fit. *See* 413 U.S. at 780, 785-787. Thus, there was in both form and substance no direct payment from the State to the sectarian schools. That did not in itself validate the arrangement. The Court said "the

fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.* at 781. Here, even that form is missing. Subject only to the parents' rubber-stamped endorsement, monies flow directly from the state treasury to the coffers of religious schools.

Ohio's Legislature could not reasonably have thought, or expected this Court to hold, that a formal procedure of receipt by parents and automatic endorsement to religious schools would avoid the Establishment Clause barrier. But it brought forth a clumsy and ineffective device to avoid the conclusion that it was providing for payments directly to sectarian schools. As the Court made clear in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), the Establishment Clause inquiry is not "a legalistic minuet" in which the observance of some prescribed form "is itself the substantive end." The substantive end is precisely to avoid the sort of direct payments of tax dollars to religious institutions, totally available for unlimited religious purposes, that the Ohio Legislature saw fit to provide in the Voucher Program.

B. *On Principles Espoused by Madison and Jefferson, and Steadily Enforced by this Court, Payments to Sectarian Schools Like Those Involved Here are Barred by the Establishment Clause*

There is no restriction of any kind on the uses to which the religious schools may put the State funds they receive under the Voucher Program. And the record is clear in undisputed fact that a dominating use to which these schools put their resources is the teaching and propagation of their respective religious beliefs. It follows, respondents submit, that the Program amounts to a fundamental Establishment Clause violation, central among the harms against which the Clause was designed and has

been understood to stand since the first days of its existence.

The record supports at length and in detail the district court's observation "that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience." (State Pet. App. 64a.) The fact is stated repeatedly in the mission statements of the several schools from which only illustrative statements suffice for this brief.

"The mission of St. Patrick School is to live and teach the Gospel message." (JA 408.) Since the majority of the religious schools are under Roman Catholic auspices, numerous statements of a similar nature are in the record (JA 293a-418a). The Cleveland Diocese says in its District Plan for Catholic Schools: "Our CATHOLIC IDENTITY will permeate every aspect of the school climate and program." (JA 504a, capital letters in original.)

Similar statements are seen from Protestant and Islamic schools (JA 419a-482a). A Lutheran school in the Program describes itself by saying (JA 437a):

> It is our belief that the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier, whose love for us moves us to show in our every act, thought, word and desire, our love for Him.

It goes on to say, underscoring words emphasized again here, that it teaches reading, mathematics, spelling, and other secular subjects *"with a Christ-centered approach."* (State Pet. App. 68a, italics in original.) And it adds as advice to parents considering the school for their children (JA 437a-438a):

> The primary focus . . . is on our Lord and Savior, Jesus Christ. In all of our goals, Jesus Christ must be preeminent. Because of our commitment to that focus and to our beliefs and philosophy, it is highly inconsistent for any parents to send a child to this school if they
>
> - Are not a Christian and/or are not interested in learning about Jesus Christ.
> - Are not living a Christian life or willing to learn how to lead such a life.
> - Are not a supporting part of a Christian congregation through worship and sharing of time and talents.

While most of the religious schools eligible for the Voucher Program are under Christian auspices, a mission statement comparable for present purposes is published by the Cleveland Community Islamic Schools (JA 481a):

> BISMILLAH (IN THE NAME OF ALLAH) Our mission at The Cleveland Community Islamic School (C.C.I.S.) is the mission of discharging our sacred duty to humanity. The sacred duty prescribed to us by Allah (the Almighty God). The sacred and incumbent duty of providing meaningful and useful knowledge to all. In line with our Islamic beliefs, knowledge and its applications is not a privilege, a pastime or a hobby, rather it is incumbent and a must upon every male and female.

Eligible religious schools repeatedly proclaim that they integrate a religious point of view into every aspect of their teaching. JA 309a, 315a, 321a, 330a, 335a, 337a,

341a, 342a, 343a, 345a, 346a, 351a, 355a, 368a, 408a, 430a, 447a, 487a.

A number of the sectarian schools state explicitly that participation in religious observances is compulsory or routinely expected without regard to the family religion of any particular student. For example:

Saint Francis School says in its Parent-Student Handbook and echoes in its Mission Statement (JA 317a):

> We are a Catholic School which promotes Catholic values, traditions and morals. We exist for Catholics, for others seeking an alternative way of education, and as an evangelizing agent of the church . . . . Students are required to participate in religion classes, prayer, and worship held during the school day.

In the Handbook of the Saint Mary Byzantine School it is said (JA 331a):

> In keeping with our intention of developing religious and moral values in accordance with Christian Catholic teachings, every student participates in daily religion classes . . . . Each student participates in daily prayer within the classroom community . . . . All student [sic] enrolled in our school must participate in our religious instruction program.

The West Park Lutheran School Parent Handbook for 1999-2000 says (JA 451a):

> Children will be expected to attend church and Sunday School at least 75% of the Sundays during the school year.

> Church and Sunday School attendance will be taken in the classroom each Monday and noted on the child's report card.

To grant tax monies for religious teaching of the kind supported throughout Cleveland under the Voucher Program runs afoul of a central prohibition enacted by the Establishment Clause. The principle at stake has been affirmed and reaffirmed in a long course of opinions by the Court and by individual Justices. Thus, the pronouncement in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), on which the Court was and has remained unanimous:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

The historical account traced in *Everson* for a Court unanimous on this subject recalled that a central goal of the colonists had been to escape taxation for the support of churches and ministers. *See id.* at 8-11. The Court recalled the now very familiar but still fundamental history of the struggle in Virginia and the "dramatic climax" there (*id.* at 11) leading to state laws that extended the same protections for conscience and against establishments that were soon to be embodied in the Establishment Clause of the First Amendment. *See id.* at 11-13. Later to be quoted in *Everson* (at 13), and by the district judge in this case (State Pet. App. 78a), Jefferson's Bill for Religious Liberty declared

> that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious

> persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.

Madison, allied with Jefferson in the Virginia struggle, and soon to become the "leading architect" of the Religion Clauses, *Flast v. Cohen*, 392 U.S. 83, 103 (1968), had produced in 1775 his monumentally important Memorial and Remonstrance Against Religious Assessments, which was to become and remain one of the most quoted and followed documents in American history.[2] The great history of this subject is familiar and is spread upon the volumes of this Court's reports. It is important once again to recall and apply the principles enforced without deviation from the heroic times of Madison and Jefferson to this date. This Court has found itself divided on a number of specific issues arising under the Religion Clauses. There has been no deviation, however, from the proposition that "[n]o tax in any amount . . . can be levied to support any religious activities or institutions, . . . whatever form they may adopt to teach or practice religion." *Everson, 330 U.S.* at 16. The Court has steadily reaffirmed that principle in opinions for the Court as a whole and in concurring opinions by individual Justices.

Just over two hundred years after the Memorial and Remonstrance, the Court reaffirmed the principle when it said that "of course"

> a tax levied for the direct support of a church or group of churches . . . would run contrary to Establishment Clause

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[2] The Memorial and Remonstrance is reprinted as an Appendix to the dissenting opinion of Justice Rutledge in *Everson*, 330 U.S. at 63 *et seq.*

> concerns dating from the earliest days of the Republic.

Rosenberger v. Rector, 515 U.S. 819, 840 (1995). Concurring in terms that read flatly against what is happening in Cleveland under the Voucher Program, Justice O'Connor said "[p]ublic funds may not be used to endorse the religious message." *Id.* at 846-47 (internal quotation marks omitted). More broadly, Justice O'Connor's concurrence went on to observe that though the cases may permit some forms of secular aid for secular functions, they "provide no precedent for the use of public funds to finance religious activities." *Id.* at 847. Deep among the objections to general assessments to support religion is the hostility from the earliest days to taxes "for the support of a denomination to which [a particular taxpayer] did not belong." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The question of Article III standing for a federal taxpayer to challenge expenditures under the Establishment Clause presented another occasion for this Court to recall the history and basic substantive principles. In holding that a taxpayer had such standing, the Court said:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute

> three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (footnotes omitted).

In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court reaffirmed again a number of Madison's precepts. It emphasized that the Religion Clauses are not simply shields for minorities but "exist to protect religion from government interference" as a broadly general matter. *Id.* at 589-90. Roger Williams, writing a century before the First Amendment, had argued for separation of the spiritual garden of God from the wilderness of secular forces. *See, e.g.*, Mark de Wolfe Howe, *The Garden and the Wilderness* (1965). Expanding on this point, as Madison had, the Court said "the Framers deemed religious establishment antithetical to the freedom of all." *Lee v. Weisman*, 505 U.S. at 591. Of particular interest in the present case is the Court's further mention of "heightened concerns with

protecting freedom of conscience . . . in the elementary and secondary public schools." *Id.* at 592. This specific thought echoes considerations the Court has noted elsewhere in dealing with the relationship between church and state. *See also Roemer v. Board of Public Works*, 426 U.S. 736, 750-51 (1976)(plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).

Justice Blackmun's concurrence in *Lee v. Weisman* (joined by Justices Stevens and O'Connor) reminded us that while they sometimes present problems of reconciliation, both Religion Clauses exist and work together to promote "religious liberty." 505 U.S. at 605. Justice Souter's concurrence (also joined by Justices Stevens and O'Connor) notes "the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement" (*id.* at 618) -- an observation that is of far greater force in a case like the present one where tax money is employed to help teach and propagate religious messages through the strength of government itself.

The focus of this subpoint in our brief thus far has been upon precedents reaching back over 200 years and extending down to date without mentioning yet the *Nyquist* decision, which has been at center stage throughout the litigation. This is not by any means to avoid or neglect that precedent. On the contrary, the respondents invoke *Nyquist* as not merely a directly applicable precedent -- indeed, one from which affirmance herein should follow *a fortiori* -- but as a decision that remains a vibrant example of Establishment Clause doctrine in its essential functioning as a bar against use of public funds to teach or promote religion. The thought in placing *Nyquist* as it is placed here is simply to avoid any suggestion that it represents a unique subject rather than an instance of solid and fundamental principle. This said, and noting that the violation here is clearer than it was in *Nyquist*, respondents' brief could scarcely omit the litany of thoughts written for the Court by

Justice Powell that proclaim the governing mandate of the Establishment Clause:

- That the form taken by transmittal of the public funds, though the use of "reimbursement" checks paid to parents might be a fact to consider along with others, could not avoid the substantive constitutional evil -- a factor, as noted earlier, on which the instant case is clearer.

- There it was said (413 U.S. at 780), in words equally applicable here: "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."

- There, as here, the large preponderance of the schools in the program (85% as against 82% in the present case) were religious schools.

- The argument that the grants were validated because they gave to parents of parochial school students benefits "comparable" to those of parents with children in public schools "prove[d] too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause." *Id.* at 782 n.38.

- The "effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.

(While the factor of impermissible "effect" has been recast somewhat, *see Agostini v. Felton*, 521 U.S. 203, 233 (1997), there is no room to doubt that the direct grants of substantial public funds, especially for the major use of teaching and preaching religion, reaches the forbidden result of "endorsement.")

- The fact that the New York checks were for "reimbursement" which parents could spend as they chose rather than for conveyance as grants directly to the religious schools did not save the New York scheme. *Id.* at 785-87. (Again, the instant case is stronger against the State than *Nyquist* was.)

- As part of the same point, but meriting separate notice, the Court said (413 U.S. at 786) that "if the grants [were] offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause [was] violated whether or not the actual dollars given eventually [found] their way into the sectarian institutions."

- Expressing sympathy for parents who must help support public schools with their taxes while paying in addition for religious school education if they choose that for their children, the Court nevertheless rejected the contention that state support for religious schooling is required by the Free Exercise Clause. *Id.* at 788-89.

In a thought related to the concern about separate financial burdens for parents of parochial school children, Justice Rehnquist (as he then was) spoke of "the State's concern that those at the lower end of the income brackets are less able to exercise freely their consciences by sending

their children to nonpublic schools." *Id.* at 810. Also dissenting, Justice White, joined by Chief Justice Burger and Justice Rehnquist, made the same point. *Id.* at 820. Without questioning the human appeal of that thought, two observations are in order. First, *Nyquist*, decided without a record, contained no evidence of the motives or reasons of the parents choosing sectarian schools.

Second, in the present case, the subject is actually treated as a matter of fact, perhaps somewhat surprisingly as it turns out. The Hanna Perkins Intervenors have placed in the record without dispute, and made of this a point upon which they rely, that 62.5% of the students attending religious schools with vouchers are in schools sponsored by a religious faith of which they and their families are not adherents (Hanna Perkins Br. 7-8, 47; *see also* State Br. 46 n.3). Individual affiants say they chose these schools for their children for such reasons as their supplying "a better education"; "the teachers are more personable" (Hanna Perkins Pet. App. 80a); the "respect . . . shown for students and teachers" (*id.* at 82a); "rules of behavior are more strictly applied" (*id.* at 84a); and other things unrelated to religion. Whatever else may be said of this intelligence, it hardly seems, with all respect, supportive of respondents' position in the case.

As an *a priori* matter, it might have been supposed that people who desired a religious school would want one representing their own faith. Instead, in Cleveland schools that earnestly and vigorously preach their own articles of faith as compulsory portions of what they teach, children are entrusted to them with tax-paid tuition for what must surely be seen by any reasonable observer as proselytization or attempted proselytization. The missionary enterprise, with whatever exceptions in literature and elsewhere, is generally regarded as a worthy endeavor by caring people. But it is a far cry from acknowledging that to considering it acceptable or desirable for governments under the Establishment Clause

to be using their funds to assist poor Americans, as it is thought, by helping to convert them from their religious associations.

To put the thought more squarely, the percentage of children from other religions or none in the state-subsidized religious schools, contrary to the virtue made of it by the Hanna Perkins Intervenors, adds support to the decision under review. As noted by Justice Stewart, who thought from time to time that the majority strayed or achieved excessive results on this subject, it has been clear and evidently unquestioned by any Justice of the Court that "government support of proselytizing activities of religious sects" is forbidden by the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 314 (1963) (dissenting). In its practical operation, the Cleveland Voucher Program offends against this prohibition.

Viewed in all its undisputed particulars, the record vindicates the conclusion that the massive infusion of state money into Cleveland's religious schools is *endorsement* of the most palpable kind. Used freely by the religious schools in Cleveland, which have religious beliefs and doctrine as a paramount message that "permeates" their teaching (*e.g.*, JA 337a), the grants collide squarely with the "axiom in the history and precedent of the Establishment Clause [that] . . . [p]ublic funds may not be used to endorse the religious message." *Rosenberger v. Rector*, 515 U.S. 819, 846-47 (1995) (Justice O'Connor concurring and quoting from the dissent of Justice Blackmun in *Bowen v. Kendrick*, 487 U.S. 589, 642 (1988)). To speak of such financing as "endorsement" in terms of the quoted passage is no mere figure of speech. It is the very pith of what we (or our government) do when we give money to support a program

or activity. We "support" or "endorse" the cause, the two words being dictionary synonyms.[3]

It is also literally correct and fair to say broadly that Ohio's funds, spread without restriction through the religious schools of Cleveland, have the "'effect' of advancing religion." *Agostini v. Felton*, 521 U.S. 203, 223 (1997). This is not a subtle question in the context of this case. It bears emphasis that, as the district court said, "a central part of each school's program is instruction in the theology or doctrine of a particular faith and . . . religion and religious doctrine are an integral part of the entire school experience." (State Pet. App. 64a.) Prayer, religious activities, the learning of "religious truth and values," and various forms of "liturgical celebrations" are required activities without apparent regard to the religious or nonreligious backgrounds of the students.

Because Ohio's resources are being given without restriction for enterprises that comprise explicitly religious "indoctrination" (521 U.S. at 223) and the "inculcation" (521 U.S. at 204) of religious beliefs and values, the Program "has the impermissible effect of advancing religion." *Agostini v. Felton, supra*, at 223.[4] This is not a

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[3] "Moreover, the term 'endorsement' is closely linked to the term 'promotion,' *Lynch v. Donnelly*, 465 U.S., at 691 (O'CONNOR, J., concurring), and this Court long since has held that government "may not . . . promote one religion or religious theory against another or even against the militant opposite' . . . ." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 593 (1989).

[4] Petitioners, neglecting what this Court wrote, undertake to distinguish *Nyquist* on the asserted ground that New York had the impermissible sectarian purpose of aiding financially troubled religious schools (State Br. 42-43; Senel Taylor Br. 18-19; Hanna Perkins Br. 45-46. To the same effect, *see* U.S. Br. Amicus 26-27.) However, the Court found a valid secular purpose in *Nyquist*, *see* 413 U.S. at 773-74, as did the courts below in this case. The New York program was invalidated, as Ohio's has been by the court below, because New York's statute had a "primary effect that advances religion in that it subsidizes directly

matter for presumption or metaphors. It is an exact description of what is being done in Cleveland. More than 200 years of history and a straight line of precedent speak against this as a violation of the Establishment Clause.

C. *The Unfortunate State of Cleveland's Public Schools in Poor Areas, Shamefully and Unlawfully Neglected by the Ohio Legislature, Supplies No Justification for the Use of Tax Monies to Support Sectarian Schools*

The State, along with the Intervenors, includes among its arguments for the Voucher Program extensive accounts of the unquestionably depressed state of Cleveland's public schools. It is a poignantly incongruous contention to come from the State and its representatives.

During the present litigation the State was resisting -- and ultimately, on March 24, 1997, lost in the Supreme Court of Ohio -- a suit in which a number of Ohio public school districts, superintendents, and board of education members demonstrated that poorer districts like Cleveland were so profoundly and discriminatorily deprived by the State's school financing arrangements as to violate the State's constitutional requirement, Sec. 2, Art. VI, that it provide a "thorough and efficient system of common schools throughout the State." *DeRolph v. Ohio*, 78 Ohio St. 3d 193, 203, 677 N.E. 2d 733, 740 (1997), *clarified*, 83 Ohio St. 3d 1212, 699 N.E. 2d 518 (1998). The record of that case showed "vast wealth-based disparities" between splendid public school conditions in affluent suburban districts and appallingly rotten conditions in city centers like Cleveland. *See id.* at 198, 677 N.E.2d at 737. Overall, the Ohio Supreme Court found, education "ranks miserably low in the state's priorities." *Id.* at 209, 677 N.E.2d at 745.

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religious activities of sectarian . . . elementary schools." 413 U.S. at 774.

A concurring Justice noted that as of 1990 "Ohio ranked forty-eighth out of the fifty states in the extent of disparity of revenue and expenditure per pupil." *Id.* at 230, 677 N.E.2d at 759 (Douglas, J., concurring).

In these circumstances, Ohio's advocates accomplish at most a display of unintended irony when they come here urging that the State's money be given in substantial amounts to religious private schools despite the Establishment Clause while the State's gross neglect of underfunded public schools continues to await a remedy.[5] The incongruity is not in itself a weighty point showing an Establishment Clause violation. It should, however, at least put to rest a surprisingly false note in the State's position.

D. *Decisions of this Court since Nyquist Leave its Soundness and Authority Unimpaired*

Six decisions of this Court rendered over the years 1983 to 2000 are heavily relied upon by the petitioners in the effort to show that *Nyquist* has somehow lost its force since 1973 and should therefore be given little or no weight in the Court's consideration of the Ohio Voucher Program. While these cases are noted elsewhere in the composition of this brief, it seems convenient and appropriate to collect them here in one place and to submit that none of them, and not all of them together, diminishes the steadily reaffirmed weight and soundness of *Nyquist.* Introductorily, we note that *Witters v. Washington Dept. of*

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[5] On September 6, 2001, the Ohio Supreme Court entered a decision and order requiring a substantial additional expenditure by the State on public education that would have included additional funds for the Cleveland City School District. *DeRolph v. Ohio*, 93 Ohio St. 3d 309, 754 N.E.2d 1184, *on reconsideration*, 93 Ohio St. 3d 628 (2001). The State sought reconsideration as to the amount of the additional spending required. The State's motion for reconsideration was granted with "Decision and opinion to follow" by order of November 2, 2001. Case No. 99-0570, *DeRolph v. Ohio*.

Servs. for the Blind, 474 U.S. 481 (1986) -- involving a relatively trivial grant to a single disabled divinity student with a choice among hundreds of educational opportunities for using his grant -- is the only one of the six, and the only one cited by petitioners anywhere, where even the most minuscule amount of government money found its way to a religious institution. That case is so thoroughly distinguishable as to lack any persuasive force for present purposes. Stressing that vital point as a factor diminishing all of petitioners' arguments from precedent, we proceed to note briefly the limits and distinctions that defeat the petitioners' reliance.

(1) *Mueller v. Allen*, 463 U.S. 388, 396 (1983), upheld provisions for tax deductions in connection with expenses of parents sending their children to both public and private schools. The Court noted the special "deference" given to state taxing arrangements and observed that the Minnesota statute there involved was "vitally different from the scheme struck down in *Nyquist*." *Id.* at 398. It also made the point (at 399), of signal importance here, that it was, as it remains, "noteworthy that all but one of [the Court's] recent cases [*Nyquist*] invalidating state aid to parochial schools [had] involved the direct transmission of assistance from the state to the schools themselves." Given those dispositive observations and the fact that nothing whatever was granted by the government to any private school in Minnesota, the *Mueller* case should not long detain us in dealing with the present problem.

It is obviously necessary, however, to attend with care to a passage upon which petitioners place heavy emphasis, namely, the Court's treatment of the use by petitioners in that case of "a statistical analysis of the type of persons claiming the tax deduction." *Id.* at 401. In that connection the Court went on to write, in a sentence the petitioners seize with enthusiasm (*id.*):

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.

From this, the petitioners reach the heady conclusion that since the enrollment figures may change from year to year, there is no way at all to take hold of this case, no way at all that *Nyquist* could have gone precisely as it did, and thus that the whole subject on which this Court has granted its writ should somehow disappear. This pattern of misconceptions does not avoid the constitutional issue before the Court, and is not warranted by an intelligent reading and the context of *Mueller* or any other case.

The case and controversy that is here will not go away despite the undoubted reality that "statistical evidence" may vary from year to year. The variations are not matters of consequence for the case at hand. The Solicitor General reports (Br. 24) that "most private schools in the Cleveland area are religiously affiliated", and this is at least equally true for Columbus, Ohio (*see* note 10, *infra*). In this case, which concerns the current facts of Cleveland, nobody suggests any fluctuations that could affect the substance of the problem before the Court, namely, the direct granting of a preponderant portion of the funds given by the State under the Voucher Program to religious schools where a paramount function is the teaching and promotion of religious doctrine.

Moreover, unless the Court's remarks on statistics in *Mueller* are swollen and distorted beyond any sensible meaning, they cannot be read to indicate that the Court for some reason has departed on this subject from the usual practice of our jurisprudence and ignored the facts on which cases of this nature are brought. Specifically, unless we are to read out of the law the question of "effects" of a

program challenged under the Establishment Clause, there is no sound way to avoid attention to the actual facts of particular cases, and this Court's treatment of such problems reflects that. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 777-78 (1995); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Board of Educ. v. Mergens*, 496 U.S. 226, 275 (1990); *Widmar v. Vincent*, 454 U.S. 263, 275 (1981).

The frequently close and subtle questions that arise under the Establishment Clause call specially for attention to concrete facts rather than broad abstractions. This necessity presses hard when the subject is one on which general principles broadly stated may yield seeming conflict rather than resolution:

> Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging -- sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case. *See Lee v. Weisman,* 505 U.S. 577, 598 (1992) ("Our jurisprudence in this area is of necessity one of line-drawing").

Rosenberger v. Rector, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring).

Thus, the district judge in this case was on plainly sound ground when he wrote (State Pet. App. 99a):

> Consideration of the number and percentage of sectarian schools participating in the Voucher Program is not forbidden by *Mueller*. Assessing the choices available to students in the

> Program by determining the number of participating religious schools versus the number of participating nonreligious schools is very different than annually taking account of the number of students who have availed themselves of a particular option. In other words, determining whether an aid recipient has neutral options available under a program is not the same as probing how the recipient has chosen to exercise those options.

(2) *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), involved state vocational assistance to a single blind adult for religious education. While similar aid could have been sought and sustained for more than one adult student, there could hardly have been many. The state assistance program was open to "a huge variety of possible careers, of which only a small handful [were] sectarian." *Id.* at 488. This rare case of aid to an adult or on behalf of at most a handful of adults was characterized by the Court as a situation in which no more "than a minuscule amount of . . . aid [was] . . . likely to flow to religious education." *Id.* at 486. The opinion distinguished *Nyquist* and pointed out that the Washington disability program was "in no way skewed towards religion." *Id.* at 488. It was a case where no "significant portion of the aid expended under the Washington program as a whole [would] end up flowing to religious education" (*id.*) as contrasted with the present situation, where the bulk of Ohio's money going to Cleveland is destined for sectarian institutions. The link between the State and the school was "a highly attenuated one." *Id.* It may bear emphasis among the many distinctions that the aid in *Witters* was for higher and vocational education, and the particular grant was for an adult, all in contrast with the schooling of the more impressionable youngsters attending

elementary school in the present case. *See Roemer v. Board of Public Works*, 426 U.S. 736, 753 (1976)(plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).[6]

(3) *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), is also fully consistent with *Nyquist's* ban on unrestricted state financial aid to religious schools. The allowance there of a sign-language interpreter to a disabled student attending parochial school lends no support whatever to the large unrestricted grants of government money to the religious schools of Cleveland. Far more significant is the fact, noted in the *Zobrest* opinion, that there "no funds traceable to the government ever [found] their way into sectarian schools' coffers." *Id.* at 10. The Court also made the point (at 12), underscored in later cases, that the secular assistance given in *Zobrest* did not relieve sectarian schools "of costs they otherwise would have borne in educating their students." *See also Agostini*, 521 U.S. at 226. Further distinctions of *Nyquist*, principally important here because this Court in that recent decision found it appropriate to make them, need not be traced at length in the case at hand. It seems sufficient that *Zobrest*, on its facts and its reasoning, lends no support to Ohio's Voucher Program.

(4) *Rosenberger v. Rector*, 515 U.S. 819 (1995) though the petitioners invoke it here and there, need not detain the Court long for its asserted bearing on the present case. It is probably sufficient to point out this Court's

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[6] There has been some disagreement within this Court as to what facts ultimately moved the majority in *Witters*. *Compare Mitchell v. Helms*, 530 U.S. 793, 812 n.6 (plurality opinion), *with id.* at 898 n.18 (2000)(Souter, J., dissenting). How the Justices might resolve that divergence is not a matter of consequence for the purposes immediately at hand; the precedential significance of *Witters* for the present case is in any event trivial and attenuated at most.

observations that the money paid in that situation to a printer (i) was a "student activity fee," not tax or other government money, *id.* at 840, and (ii) was not paid to a religious institution as that term is known in the law of the Establishment Clause, *see id.* at 844. And, to put the case quite firmly to one side unhelpful to the present petitioners, the Court observed that it is quite "correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Id.* at 842. Here, of course, the Ohio Program runs headlong and wholesale into those dangers.

(5) *Agostini v. Felton*, 521 U.S. 203 (1997), undoubtedly relaxed somewhat the barriers to aid that may reach sectarian schools, but in ways that ultimately underscore the invalidity of petitioners' position. Though the Court changed somewhat the test for judging Establishment Clause issues, it reaffirmed the continued practice of exploring "whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 223. Citing *Witters*, the Court marked its departure "from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. Still, pivotally for the concerns of the present case, the Court emphasized that in the case it was deciding none of the "funds ever reach[ed] the coffers of religious schools." *Id.* at 228. That remains the pervasive and crucial point of our submissions here. It is in respondents' view as fundamental in today's law as it was for James Madison in making the law, first for Virginia and then for the Nation. It is the core protection -- against the giving without restriction of government money to religious institutions -- that is the central redoubt at which respondents conceive themselves to be defending in this struggle. We believe that neither *Agostini* nor any other case has breached that position.

(6) *Mitchell v. Helms*, 530 U.S. 793 (2000), leaves intact the position respondents are protecting. The

plurality in that case acknowledged the "special Establishment Clause dangers" that exist "when *money* is given to religious schools or entities directly rather than . . . indirectly." *Id.* at 818-19 (italics in original). It spoke at least skeptically of "direct payments" like those involved in *Nyquist* and here. *Id.* at 819 n.8. And it noted that "direct payments of money [were] not in issue in this case" and were not the subject of any rule the plurality was considering. *Id.* at 820. Those expressions, together with the strong reservations and disagreements in the concurrence of Justice O'Connor (joined by Justice Breyer) and the dissent of Justice Souter (joined by Justices Stevens and Ginsburg) leave us a huge distance -- unbridgeable, as respondents submit it should be -- from overruling *Nyquist* and the result it entails for the instant case.

E. Nyquist *Should Not Be Overruled*

A central thesis of this brief, and of that for the respondents joined with us, has been to demonstrate not merely that *Nyquist* was correctly decided but that the circumstances presented herein call *a fortiori* for a similar finding of an Establishment Clause violation.[7] It follows that a reversal of the two courts below would necessitate overruling *Nyquist*. As reflected in learning lately reviewed

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[7] In his brief supporting the petition for certiorari (pp. 12,13), the Solicitor General spoke twice of a "conflict" between the decision of the Sixth Circuit in this case, following *Nyquist*, and the opinion of the Ohio Supreme court in *Simmons-Harris v. Goff*, 86 Ohio St. 3d, 711 N.E. 2d 203 (1999), finding *Nyquist* "undermined" and no longer controlling. As the district court herein observed, and as any runner may read, the Ohio court invalidated the Voucher Program on *state* constitutional grounds so that its extended observations on the federal question became obiter (and unreviewable) dictum. In this sense, the mistaken characterization by the Solicitor General is more than a mere technical solecism. This Court's work to keep the lines of authority clear is not aided by erroneous encouragement to the lower courts, state or federal, to assert a share in this Court's "prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. at 237.

in well considered opinions of the Court, there is no justification for, and strong arguments against, that wrenching kind of action in this case.

The Court reminded us and affirmed for the Nation just shortly ago that the rule of *stare decisis* -- though it "is not an inexorable command, and certainly it is not such in every constitutional case," *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 854 (1992) (internal quotation marks omitted) -- is not to be bypassed lightly. Before taking that kind of rare and arresting action, the Court inquires "whether the rule [to be jettisoned] has proven to be intolerable simply in defying practical workability . . . ; whether related principles of law have so far developed as to have left the old rules no more than a remnant of abandoned doctrine . . . ; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 854-55. Nothing in the extensive arguments before the Court approaches any such ground for overruling *Nyquist*.

The familiar constitutional history, including the key roles of Madison and Jefferson, recalled and applied in *Nyquist*, *see* 413 U.S. at 760, had not changed of course in 1973, nor has it changed since then. The sociological facts, including sharp divisions of opinion on the wisdom of the constitutional position, are similarly unchanged. The issue remains, as it was in 1973, a "deeply emotional" one, *see id.* at 797, and the Justices may know as citizens that the danger of "seriously divisive po[illegible]cal consequences," *see id.*, viewing our country and the co[illegible]emporary world generally, is at least as much in evidence today as it was a quarter-century ago. But nobody dares to suggest that pressures of this nature speak for overruling. And we submit, without repeating the arguments that precede and follow this subsection of this brief, that there is nothing resembling a demonstration that *Nyquist* was wrongly decided.

The absence of any showing that *Nyquist* was wrong is a matter of capital importance in this context. An overruling decision "is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong." 505 U.S. at 866. The dissenting Justices, to be sure, thought that in 1973. But the Justices who sit here now, like those who preceded them and those who will follow, need no reminder from partisan counsel that the most destructive message to convey on the subject of *stare decisis* would be that it simply turns on the changing individuals who comprise the Court from time to time.

The question whether to overrule is markedly different from the question whether the issue decided in *Nyquist* would be resolved differently by this Court were it being addressed now "in the first instance." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Here, the principles of *stare decisis* are central in the reckoning and they "weigh heavily against overruling." *Id.* That doctrine "carries such persuasive force that [this Court has] . . . always required a departure from precedent to be supported by some special justification." *Id.* (internal quotation marks omitted). The petitioners present nothing that could be deemed such "special justification." Rather, they do no more than rehearse once again arguments tendered and rejected in *Nyquist*. Far from being "undermined" in the intervening years, that case has been cited over and over again, reflecting its quality as living precedent, either to apply its principles or to define the distinguishable character of other decisions. *E.g.*, *Mitchell, supra*, 530 U.S. at 819, n.8; *Agostini v. Felton*, 521 U.S. at 225-26; *Lee v. Weisman*, 505 U.S. 577, 585 (1992); *Texas Monthly v. Bullock*, 489 U.S. 1, 10 (1989); *Allegheny County v. ACLU*, 492 U.S. 573, 592, n.44 (1989); *id.* at 628 (O'Connor, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 273 (1981); *Stone v. Graham*, 449 U.S. 39, 43 (1980); *Larkin v. Grendel's Den*, 459 U.S. 116, 119 (1982);

Committee for Public Educ. v. Regan, 444 U.S. 646, 653 (1980).

As a matter of reason, history, and sound judicial judgment, the principles followed in *Nyquist* should be proclaimed again in this case as profound safeguards for both individual conscience and truly democratic government for our uniquely diverse people.

II. WHERE, AS HERE, A PROGRAM SKEWED TOWARD RELIGION LEAVES LITTLE OR NO CHOICE BETWEEN PAROCHIAL AND NONPAROCHIAL SCHOOLS, PARENTAL "CHOICES" ARE MEANINGLESS OR IMMATERIAL

The district court, addressing the concrete facts of this case rather than abstract generalities, said (State Pet. App. 106a):

> [S]tudents in the Voucher Program have no meaningful choice between attending sectarian or nonsectarian schools. That choice is essentially made for them as a function of the fact that almost all participating schools are religious in nature. Unlike in *Witters*, nearly all state aid under the Voucher Program will flow to religious institutions. It cannot be said that this aid flows to those institutions as a result of the choice of the Program beneficiaries since nearly all the schools participating are religious. Accordingly, it is not true, as it was in *Witters*, that the Voucher Program "is in no way skewed toward religion;" in fact, just the opposite is true here. Thus, *Witters* does not apply to this case because it is not true under the Voucher Program that "aid to religion results

> from the private choices of individual beneficiaries."

This was and is exactly right. The Court of Appeals agreed (*id.* at 157a-158a).

As against these sound appraisals, the petitioners invoke repeatedly a series of distinguishable cases, extracting scraps of language that cannot serve as useful guides to decision here. They place heavy reliance on *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), which (a) as noted earlier, involved directly a single adult beneficiary (and perhaps could have applied to some more) and (b) as for "choice," gave grantees the ability to select among hundreds of predominantly secular training possibilities and schools for adult education. The contrast with this case is striking.

The petitioners also cite as an illustration of "choice" *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1987), which could scarcely be less in point. It involved assistance for the secular activity of bus transportation and thus was far from the question whether and when assistance for *religious* functions or activities may be permissible, with the Court there warning that "[n]o tax in any amount . . . can be levied to support any religious activities."

Throughout the marshalling of inapposite cases, the petitioners never once condescend upon the repeated occasions when the Court has rejected Establishment Clause claims with the vital observation that in the particular cases "no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest v. Catalina Foothills School District*, 509 U.S. at 10 (1972); *Agostini v. Felton*, 521 U.S. at 228; *cf. Mitchell v. Helms*, 530 U.S. at 798 (plurality opinion); *id.* at 848-49 (O'Connor, J. concurring); *Mueller v. Allen*, 463 U.S. at 399; *Rosenberger v. Rector*, 515 U.S. at 842.

Nyquist squarely holds that offering parents a choice between publicly financed religious education and public schooling is insufficient to avoid the constitutional bar against direct cash subsidies to those engaged in religious indoctrination. To hold this a constitutionally valid choice, the Court said, in a passage worth repeating,

> proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause.

413 U.S. at 782, n.38. None of the petitioners offers any answer to this holding.

The rejection of choice as sufficient grounds for state subsidization of religion has a pedigree far older than *Nyquist*. The Virginia Bill Establishing a Provision for Teachers of the Christian Religion,[8] referred to earlier, allowed taxpayers to choose which church they would have their taxes support, and if they did not wish to fund any church, to have their taxes earmarked for secular educational institutions. It was against this choice-based provision that Madison wrote his Memorial and Remonstrance, and it was the defeat of this bill that lighted the way for the Establishment Clause. While the kind of choice Patrick Henry then offered (primarily, though not wholly, to Christians) would fail on other grounds today, Madison's successful opposition declared a postulate that continues to inform the Establishment Clause: that the

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[8] Supplemental Appendix to the dissenting opinion of Justice Rutledge in *Everson v. Board of Education*, 330 U.S. at 74.

exaction of taxes for religious uses is not to be justified by the use of other public funds for comparable secular uses.

The petitioners seek to submerge that principle, and to avoid the force of *Nyquist*, by arguing that the secular choices of Ohio parents among public schools outside the Voucher Program, including community schools and magnet schools, are more numerous than were those available in New York in 1973. There is no need to wander outside the *Nyquist* record to discover the total of New York public schools available in 1973 in order to dispose of this misconceived and irrelevant contention. The *Nyquist* opinion itself made clear there were thousands of public schools available in New York, *see* 413 U.S. at 768, and that made no more difference in that case than it does here, whatever names the public schools are given from time to time. The *Nyquist* decision, judging the New York program there in issue, compared the number of sectarian private schools (85% of the total) with the number of nonsectarian. *See id.* That is precisely the nature of the comparison followed by the courts below in this case, noting the undisputed figures of 82% sectarian *schools* and 96% sectarian school *students* properly held to be material in this case. All the numbers and descriptions of educational programs wheeled out by the petitioners -- including the undisputed and immaterial assertions about the virtues of sectarian schools -- result only in pointless divergence from the constitutional issue in this case.

In a variant effort to avoid the impact of *Nyquist*, the petitioners purport to find comfort in a subject to which the Court made glancing reference in that case, as in other cases -- the spending of paychecks by government employees or the benefits for veterans under the G.I. Bill of Rights. It may be acknowledged that occasional dicta in this Court's opinions may appear to give superficial support to that effort. *See Nyquist*, 413 U.S. at 756, 782-83 n.38; *Witters*, 474 U.S. at 484-87, 488 n.3; *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring), 880 (Souter, J.,

dissenting); *Agostini*, 521 U.S. at 243; *Mitchell*, 530 U.S. at 816 (plurality opinion), 902 (Souter, J., dissenting). But it must be added, with entire deference all around, that the analogy is not a sound one.

The thousands of "choices" for spending a government paycheck or claiming G.I. benefits provide no support for direct government payments for unrestricted uses by institutions 82% or more of which are sectarian. But the flaws in this line of argument run deeper still. In the kinds of cases that concern us, a central initial inquiry goes to the nature of the government *programs* under which public funds are being disbursed -- *e.g.*, to pay ultimately and as an explicit feature of the program for education (as in the present and a majority of the cases) or to assist the handicapped (*Zobrest*; *Witters*). That may not be the end of the inquiry, but it is a critical beginning. Where, as in the case of the government employee's salary or the G.I. Bill, the program as constituted has no relation whatsoever to religion and a valid purpose is fully achieved with the disbursement itself, the Establishment question is never reached. The G.I. Bill, to reward those who had served, was conceived in its inception as a form of added compensation or substitute for lost compensation for the service. *See* H.R. Rep. No. 1418, 78th Cong., 2d Sess. 2 (1944); S. Rep. No. 755, 78th Cong., 2d Sess. 1-3 (1944). Once the government pays the employee, a contractor, the veteran, or another proper recipient, the further course of the money is outside our subject. That is why the question of religious contributions of their pay by government employees appears never to have posed a genuine Establishment Clause question.

Genuine questions do arise when a government program sends disbursements directly, or by an obviously predictable and short route, to sectarian institutions. On the other hand, whatever "choice" the government employee makes for the disposition of his or her salary has nothing to do with the government's reasons for paying it.

It never becomes a question, under the Establishment Clause or otherwise, that the employee may choose to spend the money for religious purposes any more than the choice to use it at the race track, a Las Vegas gambling table, or any other preferred commodity or service. The choice made by the employee is temporally and legally separate from the government's purpose in making the payment.

Another, even less fruitful line of petitioners' arguments is based upon the provision in R.C. § 3313.978(8) for tutorial assistance for public school students. Far from being a substantial counterpart of the vouchers of up to $2,250, this provision of not more than $360 for tutoring of students left behind in Cleveland's desperately poor public schools has the appearance and substance of nothing more than window-dressing. While that characterization is one that should never be lightly made, it fits this situation.

It is ludicrous at best for the Ohio Legislature to have commanded, with an odd show of supposed evenhandedness, that the Superintendent must provide a number of these $360 grants equal to the number of $2,250 grants. Nobody who works simple arithmetic could find a vestige of the fairness or equality that this facade must have been thought by some drafter to simulate.

The inclusion of this add-on as a species of "choice" has an almost macabre quality. The petitioners have described the starved Cleveland public schools throughout this litigation as places of "abysmal educational quality" -- "one of the worst urban school systems in the country." (These latest descriptions from the Senel Taylor brief, pp. 2 and 5.) The aim of any caring parent, they tell us, is to get their children out of these schools. Then, praising the scheme of tutorial grants, they speak of these as boons for "students who choose to remain in the Cleveland public schools" (State Br. 7) or "who elect to remain [or "enroll"]

in the public schools" (Hanna Perkins Br. 20, 26) or "have the option of . . . remaining in the public schools and obtaining a tutorial assistance grant" (Senel Taylor Br. 44-45). This Pickwickian idea of "choice" or "options" reflects the reality that what Cleveland got was (i) continued neglect of its public schools by the State of Ohio, (ii) a scheme of grants for the religious uses of religious schools, and (iii) a fig-leaf option of trivial tutorial assistance grants.

Given the almost exclusively religious-school choice actually available to Cleveland parents, it is hardly surprising that petitioners urge judgment of the Ohio Program on its face, and not in terms of the real-world possibilities it addresses. (State Br. 38; Senel Taylor Br. 34; Hanna Perkins Br. 15.) The preference for such an abstract judgment is especially striking when viewed against the heavy reliance petitioners place on *Witters*, with its wide world of choices among other major distinctions. Beyond the inconsistency in that plea for a facial appraisal, the argument is not meritorious. In considering whether government has acted so as to create an apparent endorsement of religion, we look to how a reasonable observer might react to the actual history and details of the situation. "[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 777 (1995) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 785-86 (Souter, J., concurring in part and concurring in the judgment). *Mitchell v. Helms*, 530 U.S. at 843 (O'Connor, J., concurring).

Further, under the subject of "choice," we note briefly the suggestion (State Br. 30) that it would be "incongruous" to invalidate the Cleveland Program "while permitting an identical program in another community, with equally troubled schools, where secular private schools command a larger share of the educational

market." The Senel Taylor petitioners undertake a similar argument (Br. 35-36) by proposing a quiz that the Court found it unnecessary to sit for in *Nyquist* -- asking whether the result would vary depending on whether sectarian schools comprised 90% or 50% or a changing percentage from year to year. The answer to these hypotheticals is simply that they lack a foundation in fact or in the law. The Establishment Clause forbids *any* substantial aid for the religious functions of religious schools. The percentage in *Nyquist* was stressed because it was so patently substantial. In any of the imaginary cases the petitioners propose, without regard to games about percentages, direct financial aid like that given in Cleveland to sectarian schools would fairly be called substantial and would violate the Establishment Clause.

As we have noted, the actual world does not cooperate with the Senel Taylor hypotheticals. Nationally, the private sectarian average runs close to the 1973 figure in *Nyquist*. *See* U.S. Br. Amicus 24.[9] Whether it did or not, however, cases would come on for decision as they arose. What is far more important is that the precise percentages are not decisive. The figures in *Nyquist* showed that massive state financing was going to sectarian schools.

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[9] The percentage that religious schools nationally comprise of all nonpublic schools has remained notably stable over the last twenty years, remaining in the 80% range described in *Nyquist* for New York. In 1980 the U.S. Department of Education's National Center for Educational Statistics' *Survey of Private and Elementary and Secondary Schools*, cited in Bruce S. Cooper, *The Changing Demography of Private Schools: Trends and Implications*, 16 EDUCATION AND URBAN SOCIETY 429, 434-35 (1984), reported that 77.3% of the schools were so affiliated. In 1989-1990, 82.7% were religiously affiliated. U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey, 1989-1990* (1992) at 3. In 1999-2000, 78.4% of nonpublic schools were religiously affiliated, U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey, 1999-2000* (2001) at 2.

That is in the end what the figures show here, with no indication that the basic situation will change. For all the reasons reviewed earlier in this brief, that kind of substantial aid, whatever its exact amount or percentage of anything else, is unconstitutional.[10]

Reinforcing still further the conclusion that *Nyquist* turned on fundamental Establishment Clause principles and not on statistics that might vary from year to year, we note the companion case of *Sloan v. Lemon*, 413 U.S. 825, 828 (1973), which the Court described as displaying "no constitutionally significant difference" between the Pennsylvania statute it held unconstitutional there and the New York statute invalidated in *Nyquist*. Addressing the Pennsylvania statute, the Court said (*id.* at 832-33):

> [W]e look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed

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10 The State Superintendent's brief, at page 45, asserts, with no citation to the record, that "Columbus, in contrast to Cleveland, boasts roughly equal numbers (about 15 each) of Roman Catholic and non-religious elementary schools." This assertion appears to be contradicted in important respects by the Superintendent's own website, which has been consulted for this purpose by Donald J. Mooney, Jr., Esq., of counsel for respondents, whose examination of that material is reported in his affidavit sworn December 4, 2001, and to be lodged with the Office of the Clerk along with this brief. Upon examination of the Superintendent's website (www.ode.state.oh.us/interactive; OEDdistbuild.htm), it appears that within the municipal boundaries of Columbus, Ohio, there are 14 Roman Catholic elementary schools, 11 elementary schools of other religious denominations, and only eight elementary schools that appear to be nonreligious. The same records show that approximately 90% of the students attending nonpublic elementary schools in Columbus are in religious schools (3,969 in Roman Catholic schools, 1,668 in schools with other religious affiliations, and only 681 students in nonreligious elementary schools).

as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Lemon v. Kurtzman*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support." 403 U.S. at 624. Again today we decline to approach or overstep the "precipice" against which the Establishment Clause protects. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

Finally, it may fairly be noted that the constant stress by petitioners on "choice" has a deceptive appeal that should not allow deviation from the values really at stake any more than it did when James Madison successfully defeated the appeal of Patrick Henry in Virginia for public payment of ministers' salaries as a matter of choice. The ability to choose has an obvious appeal in many settings as an aspect of freedom. But its role under the Establishment Clause must be and is circumscribed. A majority of the people might at times "choose" to have the government build their churches, pay their clerics, or some day foot the bill for the world's currently fastest growing body of religious law, sharia. These possibilities, seemingly chimeras today, are never remote enough to be ignored. As we look around the world, spatially and temporally, we are reminded of the long view called for by our Constitution. Again, the wisdom of Madison in his Memorial and Remonstrance remains cogent; we must "take alarm at the first experiment on our liberties." Quoted in *Everson*, Appendix to dissent of Rutledge, J., 330 U.S. at 65. Oddly enough, the Ohio Voucher Program (called a "Pilot . . . Program") has been justified repeatedly by its proponents as a useful "experiment" in dealing with contemporary problems of elementary and secondary education (*see* State Pet. App. 117a). It is an experiment that the Nation cannot afford and the Constitution forbids.

III. NEITHER THE FACTS NOR THE LAW SUPPORTS THE STATE'S DEFENSE OF "NEUTRALITY" FOR THE VOUCHER PROGRAM

Nothing respondents argue, under this heading or elsewhere, suggests any doubt as to the value of government neutrality with respect to religion -- neutrality as between or among religions or between religion and nonreligion. Our position, simply stated, is that the facts of this case afford no room for defending the Voucher Program on grounds of neutrality because the Program plainly endorses and promotes religious teaching and

beliefs. There is no basis in Establishment Clause principles for the thought, prominent in petitioners' arguments, that the government may give substantial funds to religious institutions for religious education if it also supports secular education in public schools. Neither this nor any surface appearance of "neutrality" can square the Program with the Establishment Clause.

If the Ohio Legislature could have been thought to be ignorant of the outcome it was addressing in 1995, when it enacted the Voucher Program, it was fully informed in 1999, when it passed the re-enactment now before this Court. Whether the proportions were predictable *ex ante,* as the State's brief would prefer to ask as the exclusive question (Br. 38), it is certainly plain *ex post*, as the State prefers to ignore (Br. 39-41), that the overwhelming majority of schools benefited by the Voucher Program are permeated by religious instruction and indoctrination as the crux of their mission and purpose. And the Court, applying a basic and inevitably *ex post* concept in Establishment Clause cases, has "assessed a law's 'effect' by examining the character of the institutions benefited (*e.g.*, whether the religious institutions were 'predominantly religious') . . . and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological), *see Everson, supra*, at 18." *Agostini v. Felton*, 521 U.S. 203, 232 (1997). The "Establishment Clause jurisprudence remains a delicate and fact-sensitive one." *Lee v. Weisman*, 505 U.S. 577, 597 (1992). *See also Rosenberger v. Rector, supra*, 515 U.S. at 847 (O'Connor, J., concurring).

Thus, whatever philosophical division there may be within the Court on the weight and meaning of "neutrality" in Establishment Clause cases, the subject is not complex in this case. For the Ohio law, however its drafters worded it, is in fact devoid of anything resembling the requisite neutrality. It is as a matter of plain fact skewed by preponderant grants, sufficient to pay almost the total tuition for voucher students in religious schools where the

teaching and promotion of sectarian doctrine is the central and pervasive educational purpose.[11] A departure from neutrality offends against the freedom of religion, as it did in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993), where the Court said:

> Facial neutrality is not determinative. The Free Exercise Clause, *like the Establishment Clause*, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality . . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

(Citations omitted; emphasis added.) As noted in the words we have italicized, the deviation from government neutrality in religious matters may violate the Establishment Clause as well as the Free Exercise Clause. It may be malign, as appears to have been true in *Lukumi Babalu Aye*, or less offensively aimed but still outside the neutral bounds marked by the Constitution because it loads the scales for or against religious uses, as in this case and, for example, *Larson v. Valente*, 456 U.S. 228, 247 (1982), and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). On the other hand, a forbidden abandonment of neutrality may be a violation on grounds defined in terms that include and extend beyond the concept of neutrality. For example, it seems clear

> that a secular purpose and a facial neutrality may not be enough, if in fact

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[11] "In fact, the scholarship amount is actually *higher* than the tuition costs of most participating schools." (State Br. 40, emphasis in original.)

> the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

Roemer v. Maryland Public Works Bd., 426 U.S. 736, 747 (1976)(plurality opinion). The Cleveland Voucher Program plainly transgresses the sound limits thus stated.

We have singled out the concept of neutrality for brief separate treatment both to add support for the two courts below and to help set this aside as a supposed defense of the Ohio statute. It is noteworthy in this connection that there is not a single vote in *Mitchell v. Helms* or anywhere else for the notion, pervasive in petitioners' briefs, that acceptable "evenhandedness" or "neutrality" satisfying the Establishment Clause may be achieved by grants of government funds to religious institutions for religious uses on the one hand and grants on the other hand to secular institutions for arguably comparable secular purposes -- specifically, for religious teaching or indoctrination on one side and secular education on the other. Five votes in two of the opinions expressly or essentially repudiate any such thought. *See* 530 U.S. at 848, 855-56 (O'Connor, J., concurring); *id.* at 884, 887, 890-93, 899 (Souter, J., dissenting). And the plurality opinion acknowledges that unrestricted direct grants to religious institutions engaged in religious indoctrination are at best suspect and more probably violative of the Establishment Clause. *See id.* at 809, 814, 820.

In this case, where the preponderant majority of private schools in Cleveland conduct programs "permeated" by the teaching and promotion of religious doctrine, and

where voucher students attending those schools have all, or substantially all, their tuition paid by the State, the facts call readily for an affirmative answer to the ultimate question recently put by the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, 809 (2000): "whether any religious indoctrination . . . could reasonably be attributed to governmental action." This is indeed a case where the result of the government program in issue is to "convey a message of [government] endorsement of Christianity" and other established religious messages. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment). To allow such massive direct funding of such a program violates Establishment Clause principles that remain as vital today as they were in Madison's classic formulations over two centuries ago.

CONCLUSION

On cherished principles at least as old as the First Amendment, applied specifically in the *Nyquist* case and steadily reaffirmed in the Court's Establishment Clause jurisprudence, the decision below is correct. It should be affirmed.

Respectfully submitted,

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